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Supreme Court, U.S.
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No. 92-814

In The

Supreme Court of the United States

October Term, 1992

PEPPER BURNS INSULATION, INC.,

Petitioner,

vs.

ARTCO CONTRACTING, INCORPORATED,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the court below correctly ruled under the Miller Act, 40 U.S.C. §§ 270a-270f the ninety day notice required by 40 U.S.C. § 270b(a) must actually reach the prime contractor within the ninety day statutory time-limit; mailing of the notice within the ninety day period where it is not actually received by the prime contractor outside of the ninety day period is insufficient.

RULE 28.1 LISTING

Respondent Artco Contracting, Inc. has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

TABLE OF CONTENTS

	Page
Question Presented	i
Rule 28.1 Listing	ii
Table of Contents	iii
Table of Citations	iii
Statement of the Case	1
Reasons for Denying the Writ	3
I. The Fourth Circuit's holding below correctly construed the express language of the Miller Act, 40 U.S.C. § 270b(a).	3
II. There is no conflict in the Courts of Appeals.	5
III. No important policy considerations affecting government projects are presented by this case.	7
Conclusion	11

TABLE OF CITATIONS

Cases Cited:

Bowden v. United States ex rel. Malloy, 239 F.2d 572 (9th Cir. 1956)	7
F.D. Rich Company v. U.S. for the Use of Industrial Lumber Company, Inc., 417 U.S. 116, 94 S. Ct. 2157, 40 L. Ed. 2d 703 (1974)	6

Contents

Page

Noland Co., Inc. v. Allied Contractors, Inc., 273 F.2d 917 (4th Cir. 1959) 8, 10

United States ex rel. Blue Circle West, Inc. v. Tuscon Mechanical Contracting, Inc. 921 F.2d 911 (9th Cir. 1990) 7

United States f/u/o Consolidated Electrical Distributors, Inc. v. Altech, 929 F.2d 1089 (5th Cir. 1991) 9

United States ex rel. Crowe v. Continental Casualty Company, 245 F. Supp. 871 (E.D. La. 1965) 5

United States ex rel. Excavation Construction, Inc. v. Glenn Stewart Pinckney Builders and Developers, Inc., 388 F. Supp. 289 (D. Del. 1975) 5

United States ex rel. General Electric Company v. H.L. Lewis Construction Company, 375 F.2d 194 (2nd Cir. 1967) 5, 6

United States ex rel. Greenwald-Supon, Inc. v. Gramercy Contractors, Inc., 433 F. Supp. 156 (S.D.N.Y. 1977) .. 5

United States ex rel. Honeywell v. A&L Mechanical Contractors, 677 F.2d 383 (4th Cir. 1982) 8

United States ex rel. Jinks Lumber Company v. Federal Insurance Company, 452 F.2d 485 (5th Cir. 1971) 5

United States ex rel. Lincoln Electric Product Co. v. Greene Elec. Serv., 252 F. Supp. 324 (E.D.N.Y. 1966), aff'd, 379 F.2d 207 (2nd Cir. 1967) 5, 6

Contents

Page

United States ex rel. United States f/u/o Consolidated Electrical Distributors v. Altech, Inc., 929 F.2d 1089 (5th Cir. 1991) 9

Statutes Cited:

40 U.S.C. § 270a-270f i

40 U.S.C. § 270b(a) .....i, 2, 3, 4

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Artco Contracting, Inc. respectfully requests this Court deny the Petition for Writ of Certiorari seeking review of the Fourth Circuit's opinion in this case and reported at 910 F.2d 1340.

STATEMENT OF THE CASE

Respondent refers this Court to the Fourth Circuit's opinion reproduced accurately in the Petition for an accurate Statement of Facts and procedural history of the case.

Two issues were presented to the courts below. The first issue is that which is before this Court: whether a notice seeking to

comply with the Miller Act ninety day notice requirement, 40 U.S.C. § 270b(a), is timely where it is mailed eighty-five days after the last day of work but is not received until over one hundred days after the date on which the Petitioner supplied the last labor and equipment for use on the project. The District Court held the notice was timely. The Fourth Circuit reversed holding that under the plain meaning of the Miller Act and the legislative purpose of the Miller Act, notice had to be received within the ninety day period.

The second issue not addressed by the Fourth Circuit in its opinion is whether the Petitioner timely filed this action. Petitioner completed its work on July 27, 1989. It filed its Miller Act suit on July 27, 1990. Respondent moved for summary judgment contending the suit was filed one day too late to comply with the Miller Act's requirement that:

> No such suit shall be commenced after the expiration of one year after the day on which the last date the labor and material were supplied by [the materialmen].

40 U.S.C. § 270b(b).

The District Court determined, without explication, that the suit was timely filed. The Fourth Circuit specifically declined to address the issue since the ninety day notice requirement issue was dispositive of the case.

If the petition is granted and the issue presented addressed and decided adversely to Respondent, the issue of the timeliness of the institution of the lawsuit by Petitioner must be addressed by the Fourth Circuit Court of Appeals.

REASONS FOR DENYING THE WRIT

Contrary to the assertion of Petitioner, the Circuit Courts of Appeal are not in conflict on the issue presented and agree with the opinion of the Fourth Circuit. Moreover, state court decisions are not in conflict with the Fourth Circuit's decision, also contrary to Petitioner's assertion, for the simple reason that there are no state court decisions construing the provisions of the Miller Act. Finally, there are no important policy considerations affected by the Fourth Circuit's decision. The decision of the Fourth Circuit is consistent with established law and industry practice and may be readily complied with by subcontractors and materialman with only minimal intrusive effort.

I.

THE FOURTH CIRCUIT'S HOLDING BELOW CORRECTLY CONSTRUED THE EXPRESS LANGUAGE OF THE MILLER ACT, 40 U.S.C. § 270b(a).

In relevant part the Miller Act 40 U.S.C. § 270b(a) states:

> Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished . . . and who has not been paid in full therefor . . . shall have the right to sue on such payment bond . . . *provided, however,* That any person having any direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond ***upon giving written notice*** to said contractor ***within***

> ***ninety days*** from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made.

40 U.S.C. § 270b(a) (emphasis added).

The Fourth Circuit correctly determined the language "giving written notice" means notice must be sent and received.

As the court below correctly noted, the plain meaning of the language "giving written notice to said contractor" requires receipt of the notice by the contractor.

> Mailing does not fully accomplish the condition to "giv[e] . . . notice." Such condition requires that the notice actually be "giv[en]", that is, put in possession of the contractor.

Petition at App. 22.

Congress clearly could have provided that the notice was effective "upon sending written notice" or "upon mailing written notice." To give something means to transfer it to the permanent possession of another. A gift is not complete until it is received. Use of the clear expression "giving", rather than "sending" or "mailing" which imply the effectiveness of the notice at the point of transfer rather than the point of receipt, Congress clearly indicated that notice has to be received to be effective.

Accordingly the Fourth Circuit's decision in this case is absolutely correct and in accordance with the plain meaning of the statute.

II.

THERE IS NO CONFLICT IN THE COURTS OF APPEALS.

Contrary to Petitioner's assertion that the Fourth Circuit's decision in this case directly conflicts with other Circuit Courts of Appeals' decision, the Fourth Circuit decision is in conformity with the only published Circuit Courts of Appeals opinions which can be found directly addressing this issue.

Only six other published decisions can be located addressing this issue which supposedly is of such importance to our Nation that it must be addressed by this Court as Petitioner asserts. As correctly noted by the court below, besides the instant case, only two courts have expressly ruled on the issue and both of these are district court decisions: *United States ex rel. Crowe v. Continental Casualty Company*, 245 F. Supp. 871, 873 (E.D. La. 1965); *United States ex rel. Lincoln Electric Product Co. v. Greene Elec. Serv.*, 252 F. Supp. 324, 327 (E.D.N.Y. 1966), *aff'd*, 379 F.2d 207 (2nd Cir. 1967) (*Lincoln I*). In both of these cases, the trial court held notice was sufficient for purposes of the Miller Act if it was mailed within the ninety day period. In contrast, the Second and Fifth Circuits have published opinions consistent with the Fourth Circuit's in this case, albeit in *dicta: United States ex rel. Jinks Lumber Company v. Federal Insurance Company*, 452 F.2d 485, 487 (5th Cir. 1971); *United States ex rel. General Electric Company v. H.L. Lewis Construction Company*, 375 F.2d 194, 200 (2nd Cir. 1967). Two other district courts have also in *dicta* reached the same result as the Fourth Circuit: *United States ex rel. Greenwald-Supon, Inc. v. Gramercy Contractors, Inc.*, 433 F. Supp. 156, 163 (S.D.N.Y. 1977); *United States ex rel. Excavation Construction, Inc. v. Glenn Stewart Pinckney Builders and Developers, Inc.*, 388 F. Supp. 289, 296 (D. Del. 1975).

What conflict exists in the circuit courts exists only within the Second Circuit and, interestingly, exists in two decisions authored by Judge Waterman of the Second Circuit only months apart in 1967. Specifically, in *United States ex rel. Lincoln Electric Prod. Co., Inc. v. Greene Elec. Serv.*, 252 F. Supp. 324 (E.D.N.Y. 1966) ("*Lincoln I*"), the District Court held that merely mailing the notice within the ninety day period was sufficient to satisfy the requirements of the Miller Act. *Id.* at 327. After the District Court opinion was issued, but before it was affirmed, the Second Circuit (in *dicta*), in an opinion authored by Judge Waterman in another case, specifically stated the required ninety day Miller Act notice was effective only if it was actually received within the ninety day period. *United States ex rel. General Electric Company v. H. L. Lewis Construction Company*, 375 F.2d 194, 200 (2nd Cir. 1967). Less than four months later, the Second Circuit, also per Judge Waterman, affirmed the District Court opinion in *Lincoln I* (issued prior to *Lewis Construction*) which held that notice only need to be mailed on or before the ninetieth day. The Second Circuit's affirmance of *Lincoln I*, however, did not address the notice issue. Thus the last published opinion of the Second Circuit on this issue is in conformity with the Fourth Circuit here.

Petitioner also asserts the Fourth Circuit's decision conflicts with many state court decisions construing the notice provisions of state mechanics lien statutes. However reference to state court decisions should not be made. The Miller Act was created because a lien cannot attach to Government property. *F.D. Rich Company v. U.S. for the Use of Industrial Lumber Company, Inc.*, 417 U.S. 116, 94 S. Ct. 2157, 40 L. Ed. 2d 703 (1974). The Miller Act providing a federal cause of action, is governed by federal, not state law, and reference to state law either in the construction of the act or in an attempt to create uniformity between state law and federal law is inappropriate. *F.D. Rich Company v. Industrial Lumber Company, Inc.*, 417 U.S. 116, 127.

III.

NO IMPORTANT POLICY CONSIDERATIONS AFFECTING GOVERNMENT PROJECTS ARE PRESENTED BY THIS CASE.

Petitioner asserts that the Fourth Circuit's decision creates uncertainty as to the date the Miller Act notice must be sent. Petitioner also asserts the Fourth Circuit's decision "creates an avenue for prime contractors and sureties to avoid their statutory obligations simply by not picking up registered or certified mail." Petition, page 10. Neither position is supportable.

Rather than creating uncertainty, the Fourth Circuit's decision eliminates uncertainty. The purpose of the Miller Act ninety day notice requirement is "to fix a time limit after which the prime contractor can make payment to the subcontractor with certainty that he would not thereafter be faced by claims of those who had supplied labor and materials to the subcontractor." *Bowden v. United States ex rel. Malloy,* 239 F.2d 572, 577-78 (9th Cir. 1956).

> Prime contractors have an obligation to pay their subcontractors; subcontractors have an obligation to pay their suppliers from these funds. Under the Miller Act, prime contractors may also be held liable to the suppliers directly. To avoid such double liability, the Miller Act requires those suppliers looking to the prime contractor for payment to notify the contractor promptly, so that the contractor can withhold sufficient funds from the subcontractor.

United States ex rel. Blue Circle West, Inc. v. Tuscon Mechanical Contracting, Inc., 921 F.2d 911, 914 (9th Cir. 1990).

The ninety day notice requirement is, therefore, for the benefit of the general contractor to give it a date certain when final payment may be made and for the benefit of first tier subcontractors so they can know when they will be paid. It is not for the benefit of second and third tier subcontractors and materialmen. *See United States ex rel. Honeywell v. A & L Mechanical Contractors,* 677 F.2d 383, 386 (4th Cir. 1982); *Noland Co., Inc. v. Allied Contractors, Inc.,* 273 F.2d 917, 920-21 (4th Cir. 1959).

Given that the ninety day notice period is to provide a date certain to the prime contractor after which it may make final payment, it is clear that policy requires that notice must be received within the ninety day period otherwise the requisite certainty is eliminated. The prime contractor would have to await the vagaries of mail delivery before making final payment to the detriment of its immediate subcontractor if Petitioner's position is accepted. Taking the Petitioner's position one step further, if it is assumed that the notice is lost in the mail or is not delivered for a long period of time, the prime contractor and its immediate subcontractor are made to assume the risk of non-delivery. The prime contractor either will delay payment well beyond the ninety day period or will pay at the risk of double liability. For example, if after waiting the ninety day time limit, the prime contractor pays its subcontractor because it had no notice of any claims against the subcontractor and thus the prime contractor actually receives notice of the claim of a second tier subcontractor which was mailed before the ninety day limit under the interpretation advanced by Petitioner, the prime contractor would acquire additional liability to the second tier subcontractor by virtue of its position as principal on the Miller Act payment bond. Requiring the ninety day notice to be received within the statutory time limit would prevent exposing the prime contractor to double liability.

By contrast, the subcontractor or materialman can readily protect itself by either insuring that the requisite notice is received

within the ninety day period or by insuring that the prime contractor has actual knowledge the materialman is looking to it for payment. *See, e.g., United States f/u/o Consolidated Electrical Distributors, Inc. v. Altech,* 929 F.2d 1089 (5th Cir. 1991) (Face to face meeting between materialman and general contractor followed up by a letter confirming the meeting satisifes the ninety day notice requirement if the meeting is held within the ninety day period).

The issue of policy then is whether a materialman or the prime contractor must assume the risk of an undelivered or late delivered notice. The prime contractor cannot protect itself; the materialman can. The materialman knows when it has not been paid; the prime contractor does not. The materialman can send the notice the day after it last supplies material labor to the project. This notice can be imparted through an actual meeting, federal express delivery or any other means to facilitate actual notice on the contractor's behalf. *See, e.g., United States ex rel. United States f/u/o Consolidated Electrical Distributors v. Altech, Inc.*, 929 F.2d 1089 (5th Cir. 1991). It may even send the notice by certified mail which, if it is not delivered within ten days, will be returned to the materialman allowing it sufficient time for alternative service. Placing this minimal inconvenience on the materialman eliminates an onerous burden and huge financial risk on the prime contractor and delivers certainty to the timing of payment of claims on federal construction projects. As the court below correctly noted, its ruling:

> Provides contractors with a date certain after which they are no longer at risk of liability to second-tier subcontractors. Certainty facilitates payments to first-tier subcontractors and closure of the project finances. Any alternative ruling, it seems, could potentially extend liability for an indefinite period of time

> and thus defeat the purpose of the ninety day requirement.

P. App. 23-24.

The question of policy then dictates that the notice must be received within the ninety day time period.

The court below's reading of the Miller Act serves the purpose of the Miller Act's notice requirement to protect the prime contractor "by fixing the date beyond which, in the absence of notice, he will not be liable for the subcontractor's debts." *Noland Co., Inc. v. Allied Contractors, Inc.*, 273 F.2d 917, 920-21 (4th Cir. 1959). While the provisions of the Miller Act are to be construed liberally in favor of those supplying labor or materials, the Miller Act is in derogation of common law and imparts extra-contractual liability on the prime contractor. The Miller Act should not be construed any more broadly than the express language of the Act. It also should not be construed so as to take any and all protections away from the prime contractor as provided by Congress.

CONCLUSION

Respondent Artco Contracting, Inc. respectfully requests that the Petition for Certiorari be denied. The court below reached a correct result in this case and properly construed the Miller Act's ninety day notice requirement in conformity with the plain language of the statute and the policy of the Act.

Respectfully submitted,

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